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IZZAP LTD

v.

YEOH JIN BENG & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-111-2001]
13 FEBRUARY 2007

C ***CIVIL PROCEDURE:*** *Trial - Witness - Examination of witness - Application under O. 39 rr. 1 and 2 Rules of the High Court 1980 - Depositions to be taken - Person examined out of jurisdiction - Whether witness abroad unwilling to give evidence at trial - Whether application ought to be granted*

D ***EVIDENCE:*** *Witness - Examination of witness - Application under O. 39 rr. 1 and 2 Rules of the High Court 1980 - Depositions to be taken - Person examined out of jurisdiction - Whether witness abroad unwilling to give evidence at trial - Whether application ought to be granted*

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This application by the plaintiff under O. 39 rr. 1 and 2 Rules of the High Court 1980 ('RHC') was premised on the ground that the witness concerned had in the past failed to attend court to give evidence on which the plaintiff would have to rely on to
F prove its case. The witness had on a previous occasion agreed to give evidence but had failed to turn up, an allegation that was supported by a series of letters exhibited in the affidavit of the plaintiff's director. The defendants opposed this application on the following grounds: (i) the witness had written three letters to the
G plaintiff's solicitors stating his willingness to attend court and to give evidence in this case; (ii) the evidence before the court for this application did not bear out the justification to have the witness examined as nothing in the director's affidavit said that he did not attend court in the past despite having agreed to do so;
H and (iii) in order to succeed, the applicant must show that the person in respect of whom the request is sought is unable or unwilling to be present. The plaintiff, however, contended that: (a) the only threshold that the court needed to ascertain was wide – in the interests of justice; and (b) the letters justified the
I conclusion that he was not willing to attend despite his promise to do so.

Held (allowing the application):

(1) This was a proper case for a request for assistance to be issued under O. 39 RHC to the judicial authority in Singapore that evidence be taken in accordance with the requisite procedure to be used at the trial in this court. The letters exhibited by the plaintiff's director demonstrated in clear terms the unwillingness on the part of the witness to appear to give evidence at the trial despite having assured the plaintiff that he would turn up to give evidence. A failure on his part to give evidence with respect to the issues mentioned in the affidavit would cause injustice to the plaintiff as the witness may be in possession of a critical document on which the plaintiff's case may stand or fall. (paras 6 & 7)

Case(s) referred to:
Lai Poh Choo v. Yap Suet Lay & Ors [1999] 3 MLJ 380 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 39 rr. 1, 2

Other source(s) referred to:
Malaysian High Court Practice, p 2462

For the plaintiff - Lim Kian Leong (SS Tan with him); M/s Lim Kian Leong & Co
For the defendants - T Sudhar; M/s Shook Lin & Bok

Reported by Suresh Nathan

JUDGMENT

Kang Hwee Gee J:

This is my oral judgment: (ex-tempore)

[1] This is an application by the plaintiff under O. 39 r. 1 and r. 2 of the Rules of the High Court 1980 which read as follows:

> 1. Power to order depositions to be taken (O. 39 r. 1)
>
> (1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order in Form 73 for the examination on oath before a Judge or the Registrar or some other person, at any place, of any person.

A (2) An order under paragraph (1) may be made on such terms (including, in particular, terms as to the giving of discovery before the examination takes place) as the Court thinks fit.

2. Where person to be examined is out of the jurisdiction (O. 39 r. 2)

B (1) Where the person in relation to whom an order under rule 1 is required is out of the jurisdiction, an application may be made:

C (a) for an order in Form 74 under that rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person; or

D (b) if the government of that country allows a person in that country to be examined before a person appointed by the Court, for an order in Form 75 under that rule appointing a special examiner to take the evidence of that person in that country.

E (2) An application may be made for the appointment as special examiner of a Malaysian consul in the country in which the evidence is to be taken or his deputy:

(a) if there subsists with respect to that country a Civil Procedure Convention providing for the taking of the F evidence of any person in that country for the assistance of proceedings in the High Court; or

(b) with the consent of the Minister.

[2] The justification for making this application is set out in the G supporting affidavit of the plaintiff's director Djajadi Djaja as follows:

1. I am a Director of Izzap Limited, the Plaintiff in the above matter, and am duly authorised by the said Plaintiff to affirm this Affidavit on its behalf.

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2. Save as the contrary is expressly stated, the facts deposed to herein are within my personal knowledge and/or from the records of the Plaintiff to which I have full access.

I

3. I crave leave of this Honourable Court to refer to the cause papers filed herein especially the Amended Statement of Claim dated 17.11.2004 (hereinafter known as "the Amended SOC").

The Suit

4. The Plaintiff in the Amended SOC (in particular paragraphs 12 & 13) pleaded that copies of the Declarations of Trust dated 20.12.1984 and Deed of Transfer ("Declarations No. 2") enclosed with Mr. Ang Kip Ann's letter dated 08.10.1992 addressed to Messrs. David Chong & Co. in Singapore are different from the Declarations of Trust dated 20.12.2004 and Deed of Transfer ("Declarations No. 1") in the Plaintiff's possession when the Plaintiff initiated this action. Copies of Mr. Ang Kip Ann's letter dated 08.10.1992 and the enclosures therewith are enclosed and collectively marked as Exhibit "A".

5. The 1st and 2nd Defendants denied executing both the Declarations No. 1 and the Declarations No. 2 in their Amended Statements of Defence both dated 21.12.2004 and averred *inter alia* forgeries.

6. The Plaintiff instructed the Plaintiff's solicitors Messrs. Lim Kian Leong & Co., to obtain Messrs. H. S. T. Consultancy's report on the authenticity of the 1st Defendant's signatures on both Declarations No. 1 and Declarations No. 2, executed by the 1st Defendant.

7. Messrs. H. S. T. Consultancy provided a report by Mr. Harcharan Singh Tara dated 12.05.2004 stating among others that based on the photocopied documents provided to him the 1st Defendant's signatures on Declarations No. 2 on the other hand have the common authorship with the standard documents of the 1st Defendant's signatures. A copy of the aforesaid report dated 12.05.2004 is enclosed and marked as Exhibit "B".

The Application

8. Based on the above, I am advised by the Plaintiff's solicitors, Messrs. Lim Kian Leong & Co. that it is necessary to obtain Mr. Ang Kip Ann's statements in respect of Declarations No. 2 as the same was forwarded by him when he was under the employment of WOI group of companies to the Plaintiff's solicitors, Messrs. David Chong & Co. in Singapore. Thus, he has personal knowledge on the existence of Declarations No. 2 and/or Declarations No. 1.

9. Further, I am advised by the Plaintiff's solicitors, Messrs. Lim Kian Leong & Co. and I verily believe that Mr. Ang Kip Ann may have in his possession the original set of

A Declarations No. 2 and/or has knowledge of the whereabout of the original set of Declarations No. 2 as only a copy of the same was forwarded to Messrs. David Chong & Co., Singapore.

B **Application For Letter Of Request Dated 22.07.2004**

10. The Plaintiff had on 22.07.2004 filed an Application for Letter of Request to be issued against Mr. Ang Kip Ann ("1st Application"). However, the 1st Application was dismissed by the Learned Deputy Registrar on 09.11.2004 and the Plaintiff's Appeal against the 09.11.2004 decision was disallowed on 30.11.2004.

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11. The Plaintiff did not file any Appeal against the 30.11.2004 decision.

D **Attempt To Secure The Attendance Of Ang Kip Ann**

12. Subsequent to the decision dated 30.11.2004, the Plaintiff had *via* its solicitors' letter dated 15.12.2004 requested for Mr. Ang Kip Ann's agreement to attend Court as the Plaintiff's witness for the trial of this matter and for pre-trial statements to be taken. A copy of the Plaintiff's solicitors' letter dated 15.12.2004 is enclosed and marked as Exhibit "C".

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13. Although Mr. Ang Kip Ann had *via* his letter dated 20.12.2004 agreed to attend the trial of this matter as a witness, he is not agreeable to any pre-trial statements to be taken from him. Copies of the correspondence between Mr. Ang Kip Ann and the Plaintiff's solicitors dated 20.12.2004, 21.12.2004, 04.03.2005, 10.03.2005, 16.03.2005, 13.01.2006 and 16.02.2006 are enclosed and collectively marked as Exhibit "D".

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G

14. I am also informed by WOl Group's employee in Singapore, Ms. Vivi Koerniwati that Mr. Ang Kip Ann had during the telephone conversation on 11.01.2006 expressed his reluctant to be involved and had not been co-operative on this matter.

H

15. Based on the above, I verily believe that Mr. Ang Kip Ann may have personal knowledge on matters relating to WOI group of companies in Malaysia but may not be willing to present before this Honourable Court to testify as a witness in this suit.

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16. I am advised by the Plaintiff's solicitors, Messrs. Lim Kian Leong & Co. and I verily believe that since Mr. Ang Kip Ann is resident outside Malaysia, it is impossible to secure Mr. Ang Kip Ann's appearance before this Honourable Court unless Mr. Ang Kip Ann is willing and able to present voluntarily.

17. In view of the nature of the Defendants' allegations (that the Plaintiff forged the signatures on the Trust Documents, the same denied by the Plaintiff) and in light of the discovery of Declarations No. 2, I am advised by the Plaintiff's solicitors, Messrs. Lim Kian Leong & Co. and I verily believe that it is important to secure Mr. Ang Kip Ann's testimony in respect of the matters relating to WOI group of companies in Malaysia especially the Trust Documents.

18. Further, I state that my family and I have not at the material times in question actively involved in the day to day management of WOI group of companies in Malaysia as we have entrusted the operation and management of WOI group of companies in Malaysia on the Defendants, especially the 1st Defendant and Mr. Ang Kip Ann. Therefore, it is virtually impossible for the Plaintiff to obtain information in any form whatsoever from the Plaintiff's existing records in respect of the Trust Documents.

19. Based on the above, I pray for an Order in terms of the application hereof.

[3] In essence this request under O. 39 is required on the ground that the witness concerned had in the past failed to attend court to give evidence on which the plaintiff would have to rely on to prove its case. He had on a previous occasion agreed to give evidence but had failed to turn up. A series of letters exhibited in the affidavit of the plaintiff's director support this allegation as follows:

Ang Kip Ann
34, Ellington Square
Singapore 568945

20th December 2004

Lim Kian Leong & Co.
Suite 10-8, 10th Floor,
Wisma UOA II,
No. 21, Jalan Pinang, By Courier
50450 Kuala Lumpur,
Malaysia.

Attn: Officer In Charge of Civil Suit D8-22-111-2001

Dear Sir,

Re: Your Ref 2/X/7831 Dated 15 Dec 2004 For Civil Suit No D8-22-111-2001
Izzap Ltd v. Yeoh Jin Beng & 2 Ors

I refer to your letter of the above.

I am agreeable to attend before the Kuala Lumpur High Court as a witness when the matter is called for trial, provided all my travelling, accommodation and other expenses are paid for by your client in advance.

However I am not agreeable for any pre-trial statements to be taken by any Singapore lawyers.

Yours truly,

Sgd.
Ang Kip Ann

2/X/7831 21st December 2004

Mr. Ang Kip Ann
34, Ellington Square
Singapore 568945 By Courier

Dear Sir:

Re: Kuala Lumpur High Court Civil Suit No: D8-22-111-2001
Izzap Limited v. Yeoh Jin Beng & 2 Ors

We refer to the matter above and your letter dated 20.12.2004. Our client extended their appreciation for your co-operation.

Please be informed that the presiding Judge had directed for Witness Statement to be filed in Court prior to trial to save judicial time. We would be most grateful if you may let us know your free dates and contract number to facilitate us in fixing an appointment with you for a meeting to be held in Singapore with us to discuss on the relevant matters before we proceed to draft your Witness Statement to be filed in Court in due course.

Yours faithfully,

2/X/7831 4th March 2005

Mr. Ang Kip Ann
34, Ellington Square
Singapore 568945

By Courier

Dear Sir:

Re: Kuala Lumpur High Court Civil Suit No: D8-22-111-2001
Izzap Limited v. Yeoh Jin Beng & 2 Ors

We refer to the matter above and our letter dated 21.12.2004.

As stated in our aforesaid letter, the presiding Judge had directed for Witness Statement to be filed in Court prior to trial to save judicial time.

We would be most grateful to have your free dates and contract number to facilitate us in fixing an appointment with you for a meeting to be held in Singapore with us to discuss on the relevant matters before we proceed to draft your Witness Statement to be filed in Court in due course.

We would be most grateful to have your response WITHIN SEVEN (7) DAYS HEREOF to facilitate for necessary arrangement to be made at our end.

In the event we do not hear from you within the time period stated herein, we have our client's instructions to proceed with the necessary actions including but not limited to obtaining an Order of Court for you to be examined before the Court in Singapore.

Yours faithfully,

Ang Kip Ann
34, Ellington Square
Singapore 568945

10th March, 2005

Lim Kian Leong & Co.,
Suite 10-8, 10th Floor
Wisma UOA II
No. 21, Jalan Pinang
50450 Kuala Lumpur
Malaysia

Dear Sirs,

Re: Kuala Lumpur High Court Civil Suit No. 8-22-111-2001
Izzap Limited v. Yeoh Jin Beng & 2 Ors

Thank you for your letter of March 4th, 2005.

I would like to remind you that I had previously informed you that I would be willing to attend court as a witness at the trial.

Therefore I am puzzle by your request that you like to interview me before the trial.

I would like to inform you that Mr.Yeoh Jin Beng had previously informed me that he may be calling me to testify on his behalf, hence I will be grateful if you would kindly clarify whether it would be proper for me to be a witness on behalf of your client.

Thank you,

Yours truly,

Sgd.
Ang Kip Ann

2/X/7831 16th March 2005

Mr. Ang Kip Ann
34, Ellington Square
Singapore 568945 By Courier

Dear Sir:

Re: Kuala Lumpur High Court Civil Suit No: D8-22-111-2001
Izzap Limited v. Yeoh Jin Beng & 2 Ors

We refer to your letter dated 10/03/2005 received on 15/03/2005.

We assure you that our client appreciates your willingness to attend Court as a witness at the trial.

We are surprised to learn that Mr. Yeoh Jin Beng has previously indicated to you that he may call you as a witness. In any event, that does not prevent us from interviewing you.

As explained in our previous letters, the presiding Judge had directed for Witness Statement to be filed in Court prior to trial to save judicial time. Therefore (and in light of your agreement to attend Court as a witness), we would require to have an interview with you before we are able to prepare your Witness Statement.

We would be most grateful to have your free dates and contract number to facilitate us in fixing an appointment with you for a meeting to be held in Singapore with us to discuss on the relevant matters before we proceed to draft your Witness Statement to be filed in Court in due course.

We would be most grateful to have your response WITHIN SEVEN (7) DAYS HEREOF for necessary arrangement to be made at our end.

Thank you.

Yours faithfully,

2/X/7831 13th January 2006

Mr. Ang Kip Ann
34, Ellington Square
Singapore 568945 By Courier

Dear Sir:

Re: Kuala Lumpur High Court Civil Suit No: D8-22-111-2001
Izzap Limited v. Yeoh Jin Beng & 2 Ors

We refer to the matter above.

Please be informed that the matter is set down for Full Trial on 15th February 2006 to 17th February 2006 before the Kuala Lumpur High Court Commercial Court No. 8.

As you have previously agreed to attend Court as a witness, we would be most grateful to have your necessary particulars WITHIN FIVE (5) DAYS from the date of this letter for our onward action in arranging for your transportation and accommodation for the aforesaid purpose.

Thank you.

Yours faithfully,

A 2/X/7831 16th February 2006

Mr. Ang Kip Ann
34, Ellington Square
Singapore 568945 By Courier

B Dear Sir:

Re: Kuala Lumpur High Court Civil Suit No: D8-22-111-2001
Izzap Limited v. Yeoh Jin Beng & 2 Ors

C We refer to the matter above. We also refer to our letter dated 13.01.2006.

Please be informed that the Full Trial initially set on 15th February 2006 to 17th February 2006 is now rescheduled to 16th October 2006 to 18th October 2006 before the Kuala Lumpur High Court Commercial Court No. 8.

D

As you have failed to respond to our earlier letter dated 13.01.2006 to assist us in making the arrangement for your attendance in Court, despite previously having agreed to attend Court as a witness.

E

Please let have your confirmation WITHIN FIVE (5) DAYS from the date of this letter if you are willing to attend Court as a witness for our client and your free dates for a pre-trial conference to prepare your witness statement to be arranged in Singapore, failing which we have our client's instructions to file the necessary
F application in Court to secure your attendance including but not limited to an order to secure your deposition before the Singapore Court, without further advise to you.

Thank you.

G Yours faithfully,

[4] The application is opposed by the defendants on the following grounds:

1. The witness has written 3 letters to the plaintiff's solicitors
H stating his willingness to attend court and to give evidence in this case.

2. The evidence before the court for this application does not bear out the justification to have the witness examined as
I nothing in the affidavit of the director says he did not attend court in the past despite having agreed to do so.

4. In order to succeed the applicant must show that the person in respect of whom the request is sought is unable or unwilling to be present. See *Malaysian High Court Practice* p. 2462 and *Lai Poh Choo v. Yap Suet Lay & Ors* [1999] 3 MLJ 380 at 382:

> In *Lawson v. Vacuum Brake Co* [1884] 27 Ch D 137, it is said that a heavy burden lies on the party who wishes to examine witness abroad. As to the present case, there is no sufficient evidence to satisfy this court that the witness cannot be brought here or will not come here. Respectfully the application be dismissed with costs.

[5] Reply by counsel for the plaintiff:

1. The only threshold that the court need to ascertain is wide – in the interest of justice.

2. The letters justify the conclusion that he was not willing to attend despite his promise to do so.

Findings And Decision

[6] Having heard the submission of parties, I am apt to think that this is a proper case for a request for assistance to be issued under O. 39 to the judicial authority in Singapore that evidence be taken in accordance with the requisite procedure to be used at the trial in this court.

[7] The letters exhibited by the plaintiff's director demonstrate in clear terms the unwillingness on the part of the witness to appear to give evidence at the trial despite having assured the plaintiff that he would turn up to give evidence. A failure on his part to give evidence with respect to the issues mentioned in the affidavit would cause injustice to the plaintiff as the witness may be in possession of a critical document on which the plaintiff's case may stand or fall.

[8] Order in terms. Prayer 3 to be amended: "which may be in possession" to be substituted for the words "in the possession".